SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1172

THE DENVER UNION STOCKYARD CO., THE DENVER LIVESTOCK MARKET, INC., and WESTERN STOCK CENTER, INC., Petitioners,

v.

THE DENVER LIVE STOCK COMMISSION CO., a Colorado corporation, Respondent.

RESPONDENT BRIEF AGAINST ISSUANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MASON, REULER AND PEEK,
PROFESSIONAL CORPORATION

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THE DENVER LIVE STOCK COMMISSION CO., a Colorado corporation, Respondent.

RESPONDENT BRIEF
AGAINST ISSUANCE OF WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

I. SUPPLEMENTAL STATEMENT OF CASE.

The present action is a treble damage suit brought under the Sherman and Clayton Acts (15 U.S.C. § 1, 15 U.S.C. § 2, 15 U.S.C. § 18, 15 U.S.C. § 4). The Clayton Act violation is a Section 7 violation. The thrust of the complaint is stated in two counts, the first count alleging the creation of a monopoly at the stockyards in Denver through a series

of actions culminating in the ouster of this plaintiff (respondent herein) by the defendant (petitioners herein) on or about July 1, 1966.

The second count is concerned with the acquisition and formation of subsidiaries, having the effect of lessening competition in interstate commerce, contrary to Section 7 of the Clayton Act.

The complaint and the amended complaint are attached to this brief as Appendix A. A mere reading of these documents clearly demonstrates that plaintiff has stated a case well within the doctrines of traditional antitrust litigation, calling in no manner, shape or form for the application of the doctrine of primary jurisdiction.

II. QUESTION PRESENTED.

Respondent contends that the question presented for determination by the Supreme Court at this stage of the proceeding on the petition before it, is whether petitioners have come within Rule 19 of the Rules of the Supreme Court. It is our position that the merits of the Court of Appeals decision on primary jurisdiction is not presently before the Court.

There is only one section under which petitioners can possibly seek issuance of

the writ, and that is § B, "where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter." We submit that there has been no conflict of decision between the Courts of Appeal. In addition, there is no special or important reason for the issuance of this writ, same being on an interlocutory matter.

Since the question before the Court is not the merit of the Circuit Court's opinion with respect to primary jurisdiction, but rather whether, under Rule 19, the writ should be granted at all, we will confine our answer in the present brief to a consideration of Point III of petitioners' brief, as Points I, II and IV concern the merits of the problem rather than whether the writ of certiorari should or should not be issued.

III. REASONS AGAINST ISSUANCE OF THE WRIT.

Our worthy opponents have sought the issuance of this writ upon the basis that the decision of the learned Tenth Court of Appeals in the present litigation with respect to the application of the doctrine of primary jurisdiction is in conflict with the decision of the Court of Appeals for the Eighth Circuit in *McCleneghan v. Union Stockyards Co., 298 F.2d 659 (8th Cir. 1962)*. We submit that

the conflict, if any, rests solely in the minds of our worthy opponents. We submit that the analysis given by Judge Breitenstein with respect to the complaint on file herein is well reasoned and clearly distinguishes the *McCleneghan* case. Judge Breitenstein points out,

> The instant case differs from *McCleneghan*. We are concerned with a charge of monopolization under Section 2 of the Sherman Act and of corporate acquisitions which lessen competition in violation of Section 7 of the Clayton Act. There was no charge of a Section 7 violation in *McCleneghan*. We must determine whether the doctrine of primary jurisdiction requires the stay of issues presented by the pleadings before us. *(The Denver Union Stockyard Co., The Denver Livestock Market, Inc., and Western Stock Center, Inc., Appellants, v. The Denver Live Stock Commission Co., a Colorado corporation, Appellee, (No. 10,123.)*

The *McCleneghan* case, as the learned Tenth Court of Appeals pointed out, is clearly different from the present situation.

We note that the Eighth Circuit Court, in *McCleneghan*, sets forth the gist of the *McCleneghan* complaint to be the following:

> . . . it is apparent, we think, that the gravamen of its charge is the flip system and the pen cancellation. Stripping the complaint down to these two items, we are satisfied that on its face it then contains allegations sufficient to constitute an antitrust cause of action. *(McCleneghan v. Union Stock Yards Co. of Omaha, 298 F.2d 659 (1962).)*

This is not the gist of our action.

The Court in *McCleneghan* further points out that although the Packers and Stockyards Act may contain a comprehensive plan, it contains two distinctive exceptions not found in other Acts with respect to antitrust jurisdiction, namely,

> Nothing contained in this chapter, except as otherwise provided herein, shall be construed --
>
> (a) To prevent or interfere with the enforcement of, or the procedure under, the provisions of sections 1-13, 14-21, 22-27, . . . of Title 15 . . . or
>
> (b) To alter, modify, or repeal such sections or any part or parts thereof . . . (§ 405, 7 U.S.C.A.; § 225).

followed by § 308,

> . . . and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies. *(McCleneghan v. Union Stock Yards Co. of Omaha, 298 F.2d 659, 664 (1962).)*

These sections, of course, refer specifically to the Sherman and Clayton Acts.

It is therefore apparent that the Court in *McCleneghan* clearly recognized that the Packers and Stockyards Act did not destroy the jurisdiction of the Court with respect to antitrust violations.

Our distinguished adversaries, in attempting to rely on *McCleneghan* as creating a conflict, seek to point out to this Honorable Court that in *McCleneghan*, because the Secretary of Agriculture had previously determined that the flip system was unlawful, there was no necessity to refer the matter again to the Secretary, but that since the question of pen assignments had not been so determined, the doctrine of primary jurisdiction should be invoked, that the Tenth Court of Appeals by not invoking the doctrine had created the conflict. (Point III, Page 12 et seq., petitioners' brief.) We

submit to this Honorable Court that the reasoning of *McCleneghan* creates no conflict whatsoever with the Tenth Circuit opinion in the present litigation. The reasoning of *McCleneghan* was that the flip system issue having been determined to be illegal, there was no reason to therefore refer it to the Secretary. This reasoning is completely apropos to the present litigation because the Supreme Court itself, in *Denver Union Stockyards Co. v. Producers Livestock Association, 356 U.S. 282, 78 S.Ct. 738 (1952)*, has already determined that no services could not be equated to reasonable services. This is the gravamen of respondent's complaint in the present litigation. What our opponents have sought to do is to pick out one paragraph of the complaint referring to the changes in pen assignments and weigh scales and thus have completely misconceived the thrust of the entire action. The thrust of the complaint is monopoly and ouster, not changes in pen assignments and weigh scales. It is as if one would seek to ban a book because in someone's mind a paragraph was pornographic and thus the entire book should be banned. *McCleneghan* states that with respect to pen cancellations, this is a practice which is the gravamen of the complaint. In the complaint presently before the Court, a reading clearly points out that such is not the case. Monopoly and ouster is the gravamen in the Sherman Act

violation. No technical expertise or uniformity is required, thus primary jurisdiction has no application. Neither a book nor a complaint is to be judged by one paragraph. It is the overall story that determines the matter.

Lastly, we would submit that an analysis of the *McCleneghan* opinion supports the decision of Judge Breitenstein in refusing to invoke the doctrine of primary jurisdiction, not only on the ground previously discussed, but on the ground that is apparently inferentially conceded by our opponents with respect to the Section 7 violation (page 15 of petitioners' brief) so that the truth of the matter is that there is no conflict between the two Circuits, thus no reason to issue the writ of certiorari.

IV. CONCLUSION.

In conclusion, respondent plaintiff respectfully submits that the application for writ of certiorari should be denied for the following reasons:

A. There are no special or important reasons for the issuance of the writ at this stage of the litigation.

B. There is no conflict in the decisions of the Tenth Court of Appeals and the Eighth Court of Appeals.

Therefore, this writ should be denied and the matter remanded to the United States District Court for the District of Colorado for appropriate proceedings, bringing the litigation to trial.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. _____

THE DENVER LIVE STOCK COMMISSION CO., a Colorado corporation,

Plaintiff,

vs.

THE DENVER UNION STOCKYARD CO., THE DENVER LIVESTOCK MARKET, INC. and WESTERN STOCK CENTER, INC.,

Defendants.

COMPLAINT FOR DAMAGES
(Jury Demanded)

COMES NOW the Plaintiff above named through its attorneys, Mason, Reuler and Peek, and for claim for relief against these Defendants, alleges:

I.

JURISDICTION AND VENUE

1. The present action is brought pursuant to the laws and statutes of the United States of America against these

Defendants under Section 15 of Title 15, U.S.C.A., being a part of the Act of Congress of July 2, 1890, ch. 649, 26 Statutes 209, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act and the Clayton Act.

II.

SPECIFIC SECTIONS OF STATUTES INVOLVED

1. Sherman Act violations: Title 15, Section 1, U.S.C.A.

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."

Title 15, Section 2, U.S.C.A. provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding $50,000.00, or by

imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court."

2. Clayton Act violations: Title 15, Section 18, U.S.C.A.

"No corporation engaged in commerce shall acquire directly or indirectly the whole or any part of the stock or any other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce where in any line of commerce in any section of the country the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly."

3. Title 15, Section 4, U.S.C.A.

"Several District Courts in the United States are invested with jurisdiction to prevent and restrain violations of Sections 1 through 7 of this title through . . ."

III.

DESCRIPTION OF PARTIES

1. The Plaintiff is presently engaged, and has been so engaged since 1887, in business at The Denver Union

Stockyards, acting as a commission merchant through private treaty and auction in the sale of cattle and hogs and sheep. The Plaintiff in this connection has received for sale cattle and hogs and sheep in the several states surrounding Colorado, all of which have been shipped in to the Plaintiff at The Denver Union Stockyard Co. yards where Plaintiff maintained its offices and transacted a large share of its business.

2. The Defendant, The Denver Union Stockyard Co., is the owner and has operated, either itself or through its predecessors, the premises upon which the business of the Plaintiff has been, in large measure, conducted for many years. In this connection, these premises, owned by said Defendant, are located in the City and County of Denver, in what is commonly known as "the Stockyards district." The premises consist of a main building in which the offices of the Plaintiff, as well as the Defendant, are located, and adjacent yards for the feeding, handling and processing of cattle and other livestock prior to sale to various meat packers and others using such products.

3. The Defendant, The Denver Livestock Market, Inc., is a corporation, the name of which was originally John Clay & Co. of Denver, Colorado, which company, prior to its purchase by the Defendant,

The Denver Union Stockyard Co., was a commission house competing with the Plaintiff.

4. The Defendant, Western Stock Center, Inc., is a successor corporation to The Denver Livestock Market, Inc., the name of same having been changed to Western Stock Center, Inc.

IV.

NATURE OF THE TRADE AND COMMERCE

1. The Plaintiff has been in the livestock business since 1887. During all this time Plaintiff has maintained its offices at the Livestock Exchange Building, owned by the Defendant, The Denver Union Stockyard Co.

2. The nature of the Plaintiff's business consisted primarily of the sale of livestock for many, many years, solely through private treaty. Private treaty was the independent sale of livestock to a purchaser through private agreement between the commission merchant and the purchaser of the stock.

3. Plaintiff received the livestock through shipment to it from various suppliers located in the several states surrounding Colorado, as well as suppliers within the State, who shipped the livestock via rail or truck to the office

of the Plaintiff at the yards of the Defendant, The Denver Union Stockyard Co.

4. The Plaintiff, for the use of the yards of the said Defendant, paid unto Defendant various charges as set by Defendant. In return therefor, Plaintiff used the pens and other facilities of Defendant, including weigh scales and other like items.

5. The Defendant, The Denver Union Stockyard Co., upon its acquisition of John Clay & Co. of Denver, Colorado, which subsequently became the other Defendants herein, began to change the nature of the operation at the stockyards through the institution of auction sales.

6. Prior to Defendant's acquisition of John Clay & Co. of Denver, Colorado, auction sales had been held only once a year, usually at the time of the Stock Show. Subsequent to the acquisition of John Clay & Co., auctions began to be held more and more frequently, increasing to as much as two and three times per week.

7. During auction days, the Defendant required that no cattle be sold except through the auction ring, thus requiring Plaintiff to sell any cattle consigned to it through the auction ring on those days.

8. That the marketing of livestock in Denver, Denver being one of the major centers in the country, is a unique business affected with the public interest, and the Defendant, The Denver Union Stockyard Co. is in effect a public utility.

9. That for many years the customers of the Plaintiff have shipped their cattle to Plaintiff at The Denver Union Stockyards, and that same, namely said yards, is the best and most usual place in which to sell said livestock.

V.

SHERMAN ACT VIOLATIONS
THE COMBINATION OR UNLAWFUL CONTRACT
IN RESTRAINT OF TRADE

1. Commencing with the acquisition of the two other Defendants, formerly known as John Clay & Co. of Denver, Colorado, in 1959, the Defendant, The Denver Union Stockyard Co., changed its long time position from landlord to that of landlord and competitor of Plaintiff.

2. That by reason of the fact that the Defendant, The Denver Union Stockyard Co., was also the owner of the stockyards and all its facilities, said Defendant placed its subsidiary Defendants in a favored position as against all other commission houses trading in the area.

3. That this favored position was obtained through divers means including the shifting of pen assignments for livestock, the use of weigh scales and the institution of increasing auctions, preventing the Plaintiff and others from engaging in private treaty sale of livestock.

4. That between March 1, 1959 and July 1, 1966, the Defendants, by various and divers means unknown to the Plaintiff, acquired several other of the competing commission houses, the effect of which was to reduce competition and to give the Defendants greater and greater control over the sales taking place at the stockyards.

5. That the increasing use of the auction sale rather than the private treaty sale enabled the Defendants to control and dominate the sale of livestock through the stockyards.

6. That the acquisition of the various commission houses by the Defendants permitted the Defendants to increasingly stifle competition at the stockyards, giving the Defendants increasing control of all facilities and customers who shipped livestock to the stockyards.

7. That the attempt to monopolize by the Defendants culminated in a monopoly on or about July 1, 1966, when the

Defendant, The Denver Union Stockyard Co., announced that henceforth no other commission merchants would be permitted to operate at the stockyards, that all tenancies would be terminated, and that only its subsidiaries, the other Defendants, would be permitted to sell at the yards.

8. That this ukase by the Defendants created a monopoly and destroyed competition by forcing the Plaintiff to completely change its operations, inter alia by preventing Plaintiff from receiving further shipments of cattle at the yards, and thus destroying much of Plaintiff's business.

9. That the Defendants also restrained the trade of the Plaintiff through the pirating of a valued employee of the Plaintiff by informing said employee that the Plaintiff would soon be out of business.

VI.

CLAYTON ACT VIOLATIONS

1. That the Defendants and all of them are alter egos of each other.

2. That the Defendant, The Denver Union Stockyard Co., when it purchased John Clay & Co. of Denver, Colorado, formed a corporation resulting in the

formation of the other corporate Defendants, substantially lessened competition.

3. That the acquisition of the other commission houses by the Defendants, either through acquisition of their assets or stocks, substantially lessened competition.

VII.

DAMAGE TO PLAINTIFF

1. That the actions of the Defendants amount to a combination in restraint of trade or commerce affecting the business of the Plaintiff throughout the several states with reference to purchase and sale of livestock.

2. That these acts with respect to the Plaintiff and the public at large have had and will continue to have a direct and substantial effect on interstate commerce, and have had and will continue to cause unto the Plaintiff substantial damages as hereinafter set forth:

(a) That between May 31, 1960 and May 31, 1966, the business done by the Plaintiff at the Defendant's yards decreased from 77% to 44%, a net decrease of 33%. That this decrease was caused by the acts of the Defendants heretofore enumerated and

have damaged the Plaintiff in the amount of $61,200.74.

(b) That from and after July 1, 1966, the Defendants have damaged and will continue to damage the Plaintiff by reason of the fact that Plaintiff can no longer continue its business as heretofore because of the wrongful acts of the Defendants in completely barring Plaintiff from the use of any of its facilities. That the gross profits expected to be realized by the Plaintiff from its operations at The Denver Union Stockyard for the year ending May 31, 1966 were $19,021.37 and that the loss of said profits for a reasonable period, not to exceed six years, would be $114,128.10, all to Plaintiff's damage in said amount.

(c) That the Plaintiff has suffered general damage by reason of loss of good will caused by the Defendant with the destruction of its primary place of business and consequent loss of the use of the livestock yards in the amount of $100,000.00.

WHEREFORE, Plaintiff prays:

1. That Summons issue to each of the Defendants commanding them to answer the allegations contained in this Complaint,

and to abide by and perform the orders and decrees of this Court as same may be made in the premises.

2. That the Defendants be required to reopen their facilities for the use of the Plaintiff and other like commission merchants who may apply for use, since Defendant is a public utility.

3. That the Plaintiff receive, on its claim for damage for its own account, the following:

$61,200.74 under count (a), said sum to be trebled to $183,602.22.

4. That the Plaintiff receive, on its claim for damage for its own account, the following:

$114,128.10 under count (b), said sum to be trebled to $342,384.30.

5. That the Plaintiff receive as general compensatory damages, for loss of good will, the sum of $100,000.00.

6. That the Plaintiff be awarded reasonable attorney fees as provided by law, together with the cost of this action.

7. That the Defendants be restrained and enjoined since Plaintiff will continue to be injured in the manners herein

complained of and therefore has no plain, speedy or adequate remedy at law.

8. That the Plaintiff have such other, further and different relief as to this Court appears just and equitable in the premises.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 66-C-434

THE DENVER LIVE STOCK COMMISSION CO., a Colorado corporation,

Plaintiff,

vs.

THE DENVER UNION STOCKYARD CO., THE DENVER LIVESTOCK MARKET, INC., and WESTERN STOCK CENTER, INC.,

Defendants.

AMENDMENT TO SECTION VI
OF PLAINTIFF'S COMPLAINT

COMES NOW the Plaintiff above named, through its attorneys, MASON, REULER AND PEEK, and as an amendment to Section VI of the Plaintiff's Complaint, alleges:

SECTION VI

CLAYTON ACT VIOLATIONS

1. That Defendant The Denver Union Stockyard Company is a corporation doing business in Colorado.

2. That Defendant The Denver Union Stockyard Company is a corporation engaged in interstate commerce.

3. That Defendant The Denver Union Stockyard Company acquired the assets of Lowell Commission Company and other corporations best known to Defendant.

4. That Lowell Commission Company, and possibly other corporations best known to Defendant, were, at the time of these acquisitions, corporations engaged in interstate commerce.

5. That the effect of these acquisitions was to lessen competition between other commission merchants engaged in the business of buying and selling livestock in a section of the country.

CLAIM B

1. That in addition to the violation stated above, the Defendant The Denver Union Stockyard Company formed a number of subsidiaries -- The Denver Livestock Market, Inc. and Western Stock Center, Inc., among others.

2. That by forming said subsidiaries, the Defendant The Denver Union Stockyard Company acquired the stock and assets of said subsidiaries.

3. That the effect of the formation and acquisitions of said subsidiaries substantially lessened competition in a section of the country in the business of buying and selling livestock.

CONCLUSION

1. That the Plaintiff has been injured by the violations of the Defendants referred to above, and have been damaged to the extent shown in Section VII of this Complaint.

2. That the injuries suffered by Plaintiff were the result of Defendants' violation of the anti-trust laws, entitling plaintiff to treble damages, pursuant to 15 U. S. C., Section 15.

3. That the Plaintiff prays for the relief requested in the main body of the Complaint.

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